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No. 84-1280

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CHARLOTTE BOLDEN, *Petitioner*

vs.

TARRANT COUNTY DEPARTMENT
OF HUMAN RESOURCES, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the United States Constitution requires a state appellate court to review independently the entire record in a parent-child termination case to insure that the judgment terminating the parent-child relationship was not rendered on less than clear and convincing evidence.

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CHARLOTTE BOLDEN, *Petitioner*

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TARRANT COUNTY DEPARTMENT OF HUMAN RESOURCES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Texas Department of Human Resources* respectfully prays that this Court deny the petition for writ of certiorari in the above styled case.

OPINIONS BELOW

The denial by the Supreme Court of Texas of the petitioner's application for writ of error and motion for rehearing of the application for writ of error are unpublished and reproduced in the Appendix of petitioner Bolden's petition at pages A-1 and A-2, respectively. The opinion by the Court of Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, is not reported and is reproduced in the Appendix of the

*Petitioner incorrectly referred to respondents as the Tarrant County Department of Human Resources.

petitioner's petition at pages A-3 to A-10. The decree of termination by the Juvenile Court of Tarrant County, Texas, is unreported and is also reproduced in the Appendix to the petitioner's petition at pages A-11 to A-14.

JURISDICTION

The petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(3)(1982). For reasons advanced in the argument, the respondent asserts that this Court has no jurisdiction over this case.

STATEMENT OF THE CASE

The respondent adopts the statement of the case and its facts delineated by the Court of Appeals for The Second Supreme Judicial District of Texas in its unpublished opinion reproduced in the Appendix of petitioner's petition at pages A-3 to A-10.

ARGUMENT

1. The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3)(1982), which provides that judgments of a state court may be reviewed by the Supreme Court "[b]y writ of ceritorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . or where any . . . right, privilege or immunity is specially set up or claimed under the Constitution." The petitioner's sole constitutional claim under this jurisdictional statute is predicated on the Due Process Clause of the Fourteenth Amendment.[1]

This Court has repeatedly held that it is

> a long settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either

1. To the extent that the Petitioner challenges the constitutional validity of Tex. Fam. Code Ann. § 15.02 (Vernon Supp. 1985) (providing for involuntary termination of parental rights), or other Texas statutory provisions, she should have invoked the jurisdiction of this Court by appeal pursuant to 28 U.S.C. 1257(2) (1982), because by implication the decisions of the courts below were in favor of the validity of these statutory provisions.

> expressly or by implication that the federal claim was adequately presented in the state system.

Webb v. Webb, 451 U.S. 493, 496-97 (1981) (holding that the Court had no jurisdiction under 28 U.S.C. 1257(3) (1982)). See generally, 16 C. Wright & A. Miller, *Federal Practice and Procedure* § 4022 (1977 & 1984 Supp.).

> At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts.

Webb v. Webb, 451 U.S. at 501 (emphasis in original). *Accord, Exxon Corporation v. Eagerton*, 462 U.S. 176, 181 n.3 (1983).

Because this Court under its Rule 19.1 (U.S. Sup. Ct. rule 19.1, 28 U.S.C.A.) disfavors the filing of the lower court record prior to action on a petition for writ of certiorari, *Webb v. Webb*, *supra*, 451 U.S. at 494, it is largely dependent on the assertion of a petitioner as to what that record will reflect.[2] The petitioner's petition, however, is devoid of any indication that the claim of error now made was ever properly raised in the state court system. The appendix to the petition sets out the state court judgments and orders in this case—the Texas Supreme Court's order refusing application for a writ of error (A-1); the Texas Supreme Court's order overruling petitioner's motion for rehearing of the application for writ of error (A-2); the unpublished opinion of the Court of Appeals for the Second Supreme Judicial District of Texas (A-3); and the decree of termination of the Juvenile Court of Tarrant County, Texas (A-11).[3] None of these orders, decrees, or opinions contains the slightest reference to the constitutional issue now raised here by the petitioner.

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2. Nonetheless, Rule 19.1 *supra* makes an exception to this position "when the record is deemed essential to a proper understanding of the case by this Court."

3. Omitted is the order overruling Petitioner's motion for rehearing by the court of appeals.

Nonetheless, the petitioner could validly claim that this issue is preserved for this Court's review by pointing to other parts of the record, especially her submissions of briefs and other documents in the courts below. *Webb v. Webb, supra*, 451 U.S. at 496; *cf. Exxon Corporation v. Eagerton, supra*, 462 U.S. at 181 n.3 (issue must have been raised at appropriate stage in state court process to preserve it for review in Supreme Court). In her motion for rehearing before the court of appeals, and in her application for writ of error to the supreme court, the petitioner complained that "the Court of Appeals failed to apply a standard of review commensurate with . . . proof . . . by clear and convincing evidence [but] applied instead a standard of review commensurate with proof by a preponderance of the evidence." In her motion for rehearing in the supreme court the petitioner complained of a lack of "independent review" of the trial court's findings to determine whether they satisfied the "clear and convincing evidence requirement." Pet. at 5. These general references to evidential and procedural concepts do not identify any Federal issues.

In her brief to the court of appeals, however, the petitioner asserted that "[t]he natural right between parent and child is *a fundamental constitutional right*, and for that reason all the proceedings below will be strictly scrutinized by the Court of Appeals." Pet. at 4 (emphasis supplied). The italicized words of the petitioner do not, however, preserve the claimed constitutional error, because "nowhere did she cite the Federal Constitution or to any cases relying on the [Due Process Clause] of the Federal Constitution." *Webb v. Webb, supra*, 451 U.S. at 496.

Because the petitioner has failed to carry her burden of affirmatively demonstrating that the constitutional issue presented here was properly presented in the state court system, *Street v. New York*, 394 U.S. 576, 582 (1969), this Court should treat that issue as having been presented here on petition for a writ of certiorari for the first time to any court, and should deny the petition.

2. The standard of appellate review utilized by the court of appeals in this parental-rights termination case was fully consistent with the constitutional standards set forth by this Court for such review.

a. Contrary to the suggestions of the petitioner, the court of appeals fully recognized and applied the clear-and-convincing evidence standard of proof required by this Court for the termination of parental rights in *Stantosky v. Kramer*, 455 U.S. 743, 769 (1982). Pet. App. at A-5 ("In order to support an involuntary termination, the essential facts must be proven by clear and convincing evidence."). Moreover, the trial court fully used this standard of proof in the special issues which were delivered to the jury for factual determination. Pet. App. at A-12. Indeed, the clear-and-convincing-evidence standard had been adopted by the Texas Supreme Court in parental-rights termination cases prior to this Court's decision in *Santosky*.

> *In Wiley v. Spratlan*, 543 S.W.2d 349 (Tex. 1976), we held the natural right between parents and their children is one of constitutional dimensions. The termination of the right is complete, final, and irrevocable . . . . For these reasons the proceedings below must be strictly scrutinized.

In the Interest of G.M., 596 S.W.2d 846, 846 (Tex. 1980).

> Termination is a drastic remedy and is of such weight and gravity that due process requires the state to justify termination of the parent-child relationship by proof more substantial than a preponderance of the evidence. Hereafter, the "clear and convincing evidence" standard of proof will be required in all proceedings for involuntary termination of the parent-child relationship.

Id. at 847. The same standard of proof has subsequently been adopted by the Texas Legislature. 1983 Tex. Gen. Laws ch. 298, § 2, at 1555, codified at Tex. Fam. Code Ann. § 11.15(b) (Vernon Supp. 1985). There is thus no conflict between the law applied by Texas courts and the decisions of this Court on this matter.

b. The petitioner's second complaint about the standard of review is both more express and more subtle than the first: it is that state appellate review of the termination proceedings was not based on an "independent review" of the entire

record to assure that the judgment terminating the parent-child relationship was reached on clear and convincing evidence. Pet. at 3-4. Regardless of whatever merits the petitioner's arguments may have as an abstract proposition of law, this, however, is not a case in which this Court should fashion new standards of state appellate review, because the record and the Texas law on which it is based show that the scope of appellate review was fully adequate to protect the petitioner's interest in retaining parental rights—an interest safeguarded and represented by the clear-and-convincing standard of proof.

The requirement of clear and convincing proof is, of course, a measure of satisfying the burden of persuasion. *McCormick on Evidence* § 340 (Cleary ed. 1984). The scope of appellate review used to test the sufficiency of the evidence, about which the petitioner complains in this case (Pet. at 6, 8), is, on the other hand, a measure of the burden of producing evidence. *Cf. id.* at §§ 336, 338. The crux of the petitioner's argument seems to be that the standard of appellate review for sufficiency of the evidence (i.e., whether the burden of production has been met) must be enhanced or broadened to "independent review" of the record whenever the higher clear-and-convincing-evidence standard is required, to assure that such a standard has been correctly employed in the trial court below. Pet. at 8.[4]

Texas courts, though, have broadened their scope of appellate review because of the higher burden of persuasian in parental-rights termination cases. In *In the Interest of R.L.*, 620 S.W.2d 249 (Tex. Civ. App.—Amarillo 1981, no writ), the court of appeals reversed and remanded for retrial because of insufficiency of the evidence for termination.

> [W]e . . . could not say, with any confidence, that the clear and convincing evidence necessary to affirm the judgment is discernible from the narrative statement of facts.

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4. The Petitioner cites the appellate court's use of the term of art "against the great weight and preponderance of the evidence," leaving the suggestion that this case was tried on a fair-preponderance-of-the-evidence standard for the burden of persuasion. Pet. at 4-5, 6. Such a suggestion is erroneous, because the court was merely applying a term of art confined strictly to measuring the sufficiency of the evidence. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 Texas L. Rev. 361, 366-68 (1960).

Id. at 251.

> [T]ermination proceedings must be *strictly scrutinized* and, to rebut the strong presumption that the best interest of the child is served by maintaining the parent-child relationship, the proof must be clear and convincing. *In Interest of G.M.*, 596 S.W.2d 846 (Tex. 1980). Given these considerations, we are not able to say with any degree of certainty that the proof revealed by the narrative statement of facts to justify termination meets and satisfies that standard.

Id. at 252-53 (emphasis supplied).

The very court of appeals about whose opinion the petitioner now complains took the same approach in *Hellman v. Kincy*, 632 S.W. 2d 216 (Tex. Civ. App.—Fort Worth 1982, no writ). First the court set out the standard of review for sufficiency of the evidence:

> In reviewing appellant's insufficient evidence point we must consider and weigh all the evidence in the record and set aside the verdict if it is so against the great weight and preponderance of the evidence as to be manifestly unjust.

Id. at 217. Then the court of appeals adjusted this standard of review to allow for the enhanced burden of persuasion:

> [T]he clear and convincing evidence standard of proof will be required in all proceedings for involuntary termination of the parent-child relationship . . . *Under this standard of proof, the scope of appellate review is expanded and the appellate court has more discretion in determining whether these was sufficient evidence to support the fact found by the trial court.*

Id. at 218 (emphasis supplied). Finally, the court announced that under this scope of review:

> While there is *some evidence* of probative force to support the grounds for termination, our concern is whether, on balance, the evidence is clear and convincing. *In Interest of R.L.*, 620 S.W.2d 249 (Tex. Civ. App.—Amarillo 1981, no writ). Here we hold that *such evidence* as there was failed to meet the requirement that it be "clear and convincing."

Id. at 219 (emphasis supplied). This opinion by the court of appeals conclusively demonstrates that the fact findings supporting a judgment of termination would not improperly be insulated from appellate review simply because they are supported by "some evidence," as asserted by the petitioner. Pet. at 8.[5]

The court of appeals properly followed this expanded scope of review in this case. After disposing of the petioner's "no evidence" points of error,[6] the court turned to consider her "insufficient evidence" points.[7] In establishing the proper scope of review for the sufficiency of the evidence, the court stated

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5. The court, however, finally seems to have decided the case on a "no evidence" point, that the evidence was conclusive against the judgment of termination. *Hellman, supra*, 632 S.W.2d at 219. See note 6, *infra*.

6. "No evidence" points of error call for reversal of the trial court's judgment and rendition of judgment for the appellant. "No evidence" points are generally sustainable when there is a complete absence of evidence of a vital fact, when the evidence offered to prove a vital fact is "no more than a mere scintilla," or when "the evidence establishes conclusively the opposite of the vital fact." Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error, supra*, 38 Texas L. Rev. at 362-63.

7. "Insufficient evidence" points of error call for reversal of the trial court's judgment and remand of the case for retrial. "'Insufficient evidence' points . . . should . . . be sustained when the record discloses either of the following situations: (a) the evidence is factually insufficient to support a finding of a vital fact, or (b) the finding of a vital fact is so contrary to the great weight and preponderance of the evidence as to be clearly wrong." *Id.* at 365-66.

> we must consider and weigh all the evidence in the case [and] determine whether the verdict was so against the great weight and preponderance of the evidence as to be manifestly unjust [citation omitted].

Pet. App. at A-4.[8] Then the court stated, as the final preparation for its review of the facts, that "[i]n order to support an involuntary termination, the essential facts must be proven by 'clear and convincing' evidence." Pet. App. at A-5. The implied purpose of stating this standard of proof could only have been to incorporate it as a factor into the review of the sufficiency of the evidence which immediately followed it.

The court's review of the factual basis of the jury's verdict in this case (Pet. App. A-5 to A-10) was thorough, balanced, and complete—in keeping both with the procedural requirements for review of sufficiency of the evidence, see note 7, *supra*, and with prior case law incorporating the clear-and-convincing standard into the scope of sufficiency review. *See Hellman v. Kincy, supra*, 632 S.W.2d 216; and *In the Interest of R.L., supra*, 620 S.W.2d 249. The court's review of the evidence appears, at the least, to have been equally as thorough as this Court's review of the evidence in *Jackson v. Virginia*, 443 U.S. 307, 324-26 (1979), the leading case cited by the petitioner for the proposition that an enhanced burden of persuasion requires an enlarged scope of review for sufficiency of the evidence.

The petitioner supplies no suggestion, either abstract or concrete, as to what is missing from the court's analysis of the facts that is required by the Constitution, or as to what should be added to that analysis in order to comply with the Constitution. The reason for the petitioner's failure to supply such a suggestion is evident: the review of the evidence in the termination proceedings was fully adequate to protect the petitioner's

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8. In examining such a point of error, "the court should analyze the evidence on both sides of the issue . . . and point out why the finding is regarded as being contrary to the great weight and preponderance of the evidence." Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error, supra*, 38 *Texas L. Rev.* at 368.

interest in maintaining the parent-child relationship as represented and symbolized by the heightened standard of proof required by *Santosky v. Kramer, supra,* 455 U.S. 745. There is thus no deviation by the State's courts from the constitutionally required scope of appellate review, despite the fact that Texas courts have fashioned this scope of review from their own appellate procedures and have not denominated it as "independent review."[9]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully,

JIM MATTOX
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J. PATRICK WISEMAN
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9. For parental-rights termination cases in accord, see, e.g., *McAdoo v. Spurlock,* 632 S.W.2d 224, 227 (Tex. Civ. App.—Austin 1982, no writ); *Diaz v. Beyer,* 611 S.W.2d 726, 727 and 731-32 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.), *cert. denied,* 456 U.S. 904 (1982); and *In the Interest of Hare,* 599 S.W.2d 856, 858 (Tex. Civ. App.—Texarkana 1980, no writ) (all applying clear-and-convincing-standard in connection with review for sufficiency of the evidence).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded by certified mail, return receipt requested, to: Mr. Richard Lee Griffin, West Texas Legal Services, 600 E. Weatherford, Fort Worth, Texas 76102; Ms. Alice Bussiere, National Center for Youth Law, 1663 Mission Street—5th Floor, San Francisco, California 94103; and Mr. Martin Guggenheim, New York University School of Law, 715 Broadway, 4th Floor, New York, New York 10003, on this the _____ day of _____, 1985.

_____

DAVID R. RICHARDS
Executive Assistant
Attorney General